

"The key to the solution lies in Spain, not in Catalonia"

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After the elections in Catalonia and the victory of the pro-independence camp – is Spain now at the brink of a constitutional crisis?

No more than before, or even less. If you look at the composition of the Catalanian parliament before and after the election, you see that the pro-independence camp has even lost some seats (they had 74 seats and now they have 72), even if they still have a majority. More important, though, is that they have received less than 50 percent of the votes.

So, if you style the election as a plebiscite on independence, it would be a defeat?

That was the initial claim of the Catalanian President Artur Más. He claimed that the election should be taken as a plebiscite, because there was no legal path to a referendum. And if you see it as a plebiscite, it is a defeat; the pro- camp has got 48% of the votes meanwhile the con- camp has got 52%.

But still the pro-independence camp has won the election and will now push with increased force for a secession, right?

Probably. Artur Más now has to build a coalition of very different elements such as the left republicans and his own center-right party. Make no mistake: the numbers show that there is a huge number of Catalonians who are not satisfied with the present constitutional framework. Whether they will now push for separation with more force or less, though, I am not completely sure. We will have to see how it evolves in the next days and weeks. For instance, on Sunday after the pro-independence parties proclaimed they won the elections they were very enthusiastic – some more than others. But yesterday the leader of one of the prospective coalition partners, a left-wing party called CUP, said that a unilateral declaration of independence is no more on the table because the plebiscite was lost.

Why did this conflict have to escalate to this point in the first place? Does this have mainly cultural and historical reasons or is it also a failure of the constitutional framework?

I think it has more to do with the civic political culture within the Catalan and the Spanish society – or lack thereof – than with the present Spanish constitutional framework. The Spanish constitutional system is not a federal one, of course. But if you look at level of political decentralization Spain is in fact among the top five in all Europe, federal states like Germany included. Catalonia already enjoys much more political autonomy than they would have in an ordinary formal federal system. The problem is that they feel misunderstood or misunderstood by the rest of Spain. They feel they do not get the recognition they deserve as a nation within another nation in both the political structure and the political process of Spain. That might even be partially true. So, the conflict is rather emotional than rational – unlike, for example, the conflict between Scotland and the UK which, as far as I understand, is mostly driven by rational interests: The Scottish asked if their life would be better within or without the United Kingdom – a purely rational question. In Catalonia, although this is also part of the, let us say, nominal debate, the hidden background is: They (rest of Spain) do not understand us (Catalonians)! And that feeling is according to the surveys and the electoral results majoritarian, because is not only shared by part of the pro-independence camp but also by part of the con-independence camp, too (PSC, Catalunya si que es pot). It is all about feelings, not about rationality.

Isn't the process of handling the conflict also different? In the UK it was possible to sort out the differences in a political process, at least for the time being, whereas in Spain that seems to be impossible. Why is that?

That has to do with the different constitutional framework in both countries. The United Kingdom, as you know, does not have a formal constitution, and therefore there are no such rigidities as we have in countries with a formal constitution, such as Germany or Spain. But on the other side, it also has to do with the fact that the politicians, mostly those from the conservative party, hide behind this legal rigidity to avoid the political debate

that is necessary. They only look to extreme understandings of the Spanish identity, supported by a minority of their voters (their “tea-party voters”), who dream of a monolithic unified Spain that does not recognize national differences. Or in the case of the separatists they rely on an imagined pre-existing Catalanian nation that would have been at any time a sovereign Kingdom and should become again now a sovereign republic, leaving aside the respect for the given common constitutional framework (more than 90% of Catalanian citizens voted for the Spanish Constitution in 1978). I am not sure how long this escaping from the real problems will be sustainable. There is substantial historical evidence that if the two majoritarian parties would agree on a solution the legal issues would not be a that much of a hurdle.

So, the key to the solution lies in Spain, not in Catalonia?

In a way, yes. You see, there are two ways of altering the constitution, and both are very rigid. You either have to get the approval of three fifths of both chambers and eventually, if one tenth of either chamber calls for it, a referendum. The other way is to get the approval of two thirds in both chambers in two separate votes with a general election between them, plus a mandatory referendum. We have amended the constitution in 2010, regarding budget controls and austerity, through the first procedure, with 80 percent of deputies and senators agreeing, and no referendum. If both parties agreed on the issue of territorial organisation they would have the necessary majority and they would be able to make a convincing case to win the referendum. So, it is a political much more than a legal issue. The legal hurdles are only a pretext to hide the fact that the two major parties cannot reach a consensus.

What exactly are they disagreeing upon?

The Social Democrats are rather sympathetic to a federalization of Spain which would satisfy the constitutional needs of most Catalonians, whereas the conservative Popular Party still relies on the vision of Spain as a monolithic, homogenous nation. Which is totally fictitious, of course. Spain has been politically unified only in 1715 after the final abolition of the self-government rights and privileges of the different kingdoms composing Spain. Our constitution still recognizes some of those rights from the feudal age, e.g. for the Basque country or Navarra. They collect all taxes and every five years conclude a new agreement with the central government about the amount they will pay for the central Government services in those territories (such as Social security, Army, etc...)

The most counterfactual pretensions of unity and nationhood are often the most difficult to overcome...

Right. The longer the conservative party and the separatist parties rely both on this counterfactual idea of Spanish or Catalanian (Basque too) identity as pre-legal and monolithic nations the less possible it becomes to solve the problem.

Let us turn to the Constitutional Court. On Thursday, the parliament will probably enact a law that will place the Court in the center of the political battle against Catalan separatism, giving it the competence to enforce its own rulings on the unconstitutionality of any movement towards independence. What do you make of this law? What effects will it have on the role of the Constitutional Court in the Spanish judicial system?

Not much. All constitutional courts all over the world are guided by the principle of self-restraint. They have a legal function, but they rule on political issues, as a countermajoritarian institution. They have to be very careful not only in what they rule on, but also in the way they do it. This new law which gives the Constitutional Court the power to enforce its own rulings, as if it were an ordinary Court, goes against this principle of self-restraint. The fight against regional separatism should be fought on the political field and only in extreme cases before criminal courts as a ultima ratio. You cannot treat the Constitutional Court as if it were just an ordinary court. That would put at risk its reputation which is already fairly damaged.

Is it?

Yes, it is. In the Spanish public opinion, the Constitutional Court as well as the highest levels of our judiciary are very much discredited.

They are perceived as overly politicized?

The way they are nominated is not the most elegant, to be sure, but that is not the main problem. It has more to do with a lack of merit and true legal reputation of some of the judges than with the appointment of judges.

So, the instrumentalization of the Constitutional Court in the struggle against regional separatism could in fact damage its authority even more?

I do not think so, in the end. The Justices of the Constitutional Court will try to avoid its implementation as much as they can. They already have expressed their discomfort with this kind of amendments. It is widely known that the Spanish Constitutional Court nowadays is held by a majority of conservative judges who, nevertheless, feel very much uncomfortable with this political decision. The problem is that the conservative government today has two options: Either they negotiate. For that, they have to change their minds and run the risk of losing a small, ultra-centralist part of their electorate. Or they remain as rigid as they are. Then, if the Catalan side does not sway either, the only way out would be to apply federal coercion in the end. This would be absolutely unheard of. Federal coercion is a symbol of central power but it should never be applied. If you have to apply it that shows that the system does not work properly.

Two million Catalans have declared to be determined to separate from Spain. Given the violent recent history of your country, with a civil war and separatist terrorism and unspeakable atrocities of all kinds – how much is at stake if those two million people remain forced to stay Spanish against their will indefinitely? If this situation keeps festering on, do you think Spain might slip back into a political state we all have thought long overcome in Europe?

I do not think there will be such a horrible scenario. It is true that two million Catalonians are unhappy with the status quo. But they are not necessarily all separatists. A binding democratic constitutional system in complex globalized societies cannot rely on the coercive imposition of its rulings on such a representative number of citizens, because that will put at risk its external but also internal efficacy. There is no democracy besides the law, but there is no long-term binding law which does not democratically accommodate the interest of minorities (in this case territorial ones) to the interest of majorities. That is why I think the only way to get out of this blockade would be a new parliament after the general elections in three months that is able to give satisfaction to the wish of Catalonians to change the status quo and to provide more self-determination within Spain. The only way to do this is through a constitutional amendment to establish Spain as a formal federal state and to recognize the 17 autonomous communities as founding nations within the Spanish nation.

Do you think that would suffice to satisfy those two million Catalonians?

No. Furthermore, a constitutional amendment procedure would be necessary for all those 17 nations to exert their right of self-determination and secede if they so wish. This would have to require a qualified majority. You have to protect the rights of the minority in Catalonia and also the rights of the rest of the Spaniards. You cannot decide on separation with only 51 percent of Catalanian voters. There are other interests at play, legal, economical, political ties. So, let us ask for a qualified majority. Two thirds or three fifths in parliament, then two years of intense negotiations, and finally a referendum, again with a qualified majority.

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Europe is no more a place where decisions can be imposed on millions of individuals through coercion. We will have to let them go.

Questions: Maximilian Steinbeis

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